

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mrs E's complaint and no further action is required by NHS BSA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs E has complained that NHS BSA has not correctly applied its regulations when calculating her entitlement to benefits from the Scheme.

Background information, including submissions from the parties

4. In February 2016, Mrs E turned 55, which is the minimum age at which she could claim her pension benefits from the Scheme.
5. On 7 March 2016, NHS BSA responded by letter to a telephone query made by Mrs E concerning the calculation of her benefits. It said that as Mrs E held Mental Health Officer status (**MHO status**), on completion of 20 years' service, every subsequent year of such service would count as two; which was termed "doubling." It said that Inland Revenue limits meant that MHO members could not accrue more than 40 calendar years' membership at age 55. It confirmed that the reckonable service it had calculated for Mrs E, this being 29 years and 183 days, was correct, with her calendar length membership being 40 years and one day.
6. On 1 April 2016, Mrs E formally complained to NHS BSA saying that the length of service pertaining to her pension entitlement should be 35 years and 103 days, with 16 years, 118 days accrued at her doubling date, plus a further 9 years and 175 days, doubled, after. She said NHS BSA had refused to listen to her explanation and instead just said its calculation was correct. Mrs E highlighted that she had contacted several colleagues in a similar position and their pension calculation was different to hers.

7. On 8 June 2016, NHS BSA responded under stage one of the Internal Dispute Resolution Procedure (**IDRP**). It said: -
- For Mrs E, doubling began on 3 March 2000. At this point she had 20 calendar years membership and 16 years 117 days reckonable membership.
 - Members with MHO status could retire with unreduced benefits at age 55, however the maximum membership they could achieve was 40 years calendar membership at age 55 and 45 years overall.
 - As Mrs E had exceeded 40 calendar years scheme membership at age 55, her reckonable and calendar length scheme membership had to be restricted.
 - The scheme membership used in the calculation of Mrs E's benefits was correct.
8. On 17 June 2016, Mrs E replied saying that she wished to appeal NHS BSA's decision. Specifically, she said: -
- NHS BSA had defined calendar length membership as the actual length of employment. In her case, this was 36 years and 159 days. Therefore, she had not exceeded 40 years of calendar membership and no restriction should apply.
 - NHS BSA had, without explanation, added 15 years to her calendar length membership.
 - The number of doubled years stated by NHS BSA was 8 years 325 days, when it should be 9 years and 176 days. This was on the basis that she had accrued 16 years, 117 days on her doubling date with reckonable service of 25 years 293 days at retirement. Therefore, this latter figure, minus 16 years, 117 days equalled 9 years, 176 days.
9. On 25 July 2016, NHS BSA responded to Mrs E under stage two of the IDRP. It said:-
- Mrs E accrued 20 calendar years MHO membership on 2 March 2000 and from 3 March 2000 to 9 February 2016 accrued an additional 15 years doubled calendar membership, leading to a total calendar length membership of 51 years and 159 days, which was restricted to 40 years.
 - Confirmation of doubled years could be found in regulation R3 of the 1995 NHS Pension Scheme Regulations (**the Regulations**).
 - Part-time calendar membership had to be scaled to its whole-time equivalent length to give an amount that was reckonable for benefits. This meant that membership from 5 November 1990 was scaled as were the doubled years accrued during part time years.
10. Mrs E subsequently sent her comments to NHS BSA on its stage two response. She said: -
- NHS BSA was incorrect in saying that after accruing 20 years of 'calendar membership', MHO status members could accrue an extra year of 'calendar membership'. Rather, Regulation R3 said that each complete year of

‘pensionable service’ as a mental health officer in excess of 20 years would count as two years ‘pensionable service’.

- Hence, the Regulations did not provide for calendar length membership to be doubled but for this to apply to pensionable service.
- R3 did not set out the number of calendar years an MHO member could accrue by age 55. However, an NHS Employer Guidebook, which could be found online, limited this to 40 years reckonable membership at age 55 in special cases, scaled for part time-membership.
- NHS BSA, had incorrectly applied this restriction to calendar membership, rather than reckonable membership.
- Regulation C2(3) stated that benefits would be calculated by reference to a maximum of 45 years ‘pensionable service’; her calculation showed her pensionable service to be 35 years and 109 days, so less than 40 years.

11. Mrs E subsequently referred her complaint to this Office.

12. On 24 February 2017, NHS BSA sent us its formal response. It said: -

- Mrs E’s last day of pensionable service was on her birthday so she accrued a total of 40 years and one day.
- From 5 November 1990 Mrs E worked part-time. Regulation R5 required part time service to be scaled to its whole time equivalent. All her restricted doubled years, were treated as part time and scaled. This was in line with Regulation R3(5)(b) which required each year to count as two.
- NHS BSA selected the part-time service which gave the greatest amount of service to count for benefits in respect of additional doubled service.
- Overall, Mrs E’s pensionable service worked out to be 36 years and 159 days, which when adding on 15 years for doubled years, equalled 51 years and 159 days. Mrs E’s membership was restricted to 40 years at age 55, and then part time years scaled to their whole time equivalent. Her total membership reckonable for benefits was 29 years and 183 days.

13. On 17 March 2017, in response to the above, Mrs E said: -

- NHS BSA was incorrectly interchanging “Pensionable Service” and “Calendar Membership” and still doubling calendar membership, which was not in accordance with the Regulations.
- Under C2(1) of the Regulations, it was stated that pensionable service counted both for the purpose of ascertaining entitlement to benefits and calculating them. NHS BSA was incorrectly using calendar membership for these purposes.
- The Regulations said all contributing part time membership counted at full calendar length towards qualifying membership, but converted to the whole time equivalent for counting as reckonable membership.
- This meant that Calendar membership was used to trigger doubling of pensionable service after 20 years calendar membership.

- She had made a small mistake in her previous calculation by adding a period of employment twice. Her final calculation was that her calendar membership from 1979 to 2000 was 20 years and 181 days, and reckonable at 16 years 118 days. From 2000 to 2016, her reckonable membership was 9 years and 175 days, which when doubled and added to the aforementioned reckonable service, meant her pensionable service was 34 years and 293 days.

Adjudicator's Opinion

14. Mrs E's complaint was considered by one of our Adjudicators who concluded that no action was required by NHS BSA. The Adjudicator's findings are summarised briefly below: -

- Mrs E disputed that MHO members accrue an extra year of calendar membership after having accrued 20 years of calendar membership.
- Regulation R3(5)(b) provides this definition: "each complete year of pensionable service as a mental health officer in excess of 20 years will count as 2 years' pensionable service."
- Mrs E was correct in saying that the Regulations do not refer to "calendar membership."
- The term pensionable service, used by Regulation R3, was defined under Regulation C2. The first part of this Regulation says: "pensionable service is service which counts both for the purpose of ascertaining entitlement to benefits under these Regulations and for the purpose of calculating them."
- It goes on to say that pensionable service included any period of pensionable employment in respect of which the member contributes to this Section of the scheme under regulation D1.
- Hence, it seemed pensionable service was a catch-all definition which could apply to reckonable and additional service, as well as service credited through pension transfers.
- The key definition was that pensionable service concerned the period of pensionable employment in respect of which the member contributed to the Scheme. Therefore, pensionable service was closer to calendar membership where part time service was not distinguished. Therefore, reckonable service was an element of pensionable service, not equal to it.
- NHS BSA has used the terms pensionable service and calendar membership interchangeably as Mrs E contended. Calendar membership was not defined in the Regulations. Supporting notes provided by Mrs E from NHS BSA defined calendar length membership as the "actual length of the employment. However, as Mrs E was contributing to the Scheme since she began her employment with the NHS, and as she did not transfer in any additional service from other pension schemes, her calendar membership and pensionable service, before doubling, were likely to be the same.

- In terms of ascertaining entitlement as per Regulation R3, it would appear that all the named forms of membership were included.
- Paragraph 3 of the Regulation, which concerned the calculation of membership, referred to “pensionable service” in restricting membership, not reckonable membership.
- Mrs E had provided an Employers Guide found on NHS BSA’s website. Under the “Limits on Membership” section, 40 years of reckonable membership was referred to, at age 55 for special classes. However, the Regulations took precedence over guidebooks or other ancillary documents.
- The calculation methodology adopted by Mrs E, calculated the reckonable service accrued to arrive at a figure for her total pensionable service. However, whilst the Regulations said pensionable service counted both for the purpose of ascertaining entitlement to benefits under these Regulations and for the purpose of calculating them, pensionable and reckonable service were not interchangeable, therefore reckonable service could not be used in the way Mrs E proposes.
- It was not possible to agree with Mrs E’s interpretation of the Regulations for the purposes of calculating her benefits

15. NHS BSA accepted the Adjudicator’s Opinion. Mrs E did not accept the Adjudicator’s Opinion and made the following comments: -

- She still believed that NHS BSA had incorrectly calculated her benefits. NHS BSA was doubling calendar membership which was not in accordance with Regulation R3(5b). This stated that each year of pensionable service as a MHO in excess of 20 years would count as 2 years’ pensionable service.
- The figure pertaining to ‘Restricted Doubled years scaled to reckonable length’ in NHS BSA’s letter of 25 July 2016 required further explanation.
- NHS BSA’s interchangeable use of the terms pensionable service and calendar membership did cause a problem, as there was a clear difference between the two. For periods of part time work, calendar membership was adjusted to pensionable service in accordance with Regulation R5.
- The Adjudicator had said in one part of the Opinion that Mrs E had used pensionable service in her calculation, then later implied that she was using reckonable service. She agreed that pensionable service was the deciding factor when restricting membership, not reckonable membership.
- Her calculation used agreed calendar membership, adjusted for part time work to calculate pensionable service, whereas NHS BSA had used reckonable membership.

16. The Adjudicator said that her position remained as set out in her Opinion but requested a further breakdown from NHS BSA of how it had arrived at the figure it did for 'Restricted Doubled years scaled to reckonable length,' as requested by Mrs E.
17. Mrs E asked that the matter be referred to an ombudsman, saying that NHS BSA's explanation and calculations had not been as detailed as her own, so could be misleading or incorrect.
18. NHS BSA provided the above breakdown to the Adjudicator which has been forwarded to me. Mrs E also provided her further comments.
19. The complaint has been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs E for completeness.

Ombudsman's decision

20. Regulation C2(3)(b) imposes a limit on MHO members' pensionable service of 45 years in total, with a maximum of 40 years' pensionable service before reaching age 55.
21. Regulation R5(1) (Part-time employment) requires pensionable service relating to part-time service to be 'scaled back' from its "full length" to its "whole-time" equivalent for the purpose of calculating benefits under the scheme.
22. However, Regulation R5(1) is expressed as being subject to Regulation R5(10), under which part time employment counts at its "full length" for the purpose of determining whether a member's pensionable service has exceeded the limit imposed by Regulation C2(3)(b).
23. "Full length" of a member's pensionable service is not defined in the 1995 Regulations. However, in the context, I consider that it means the years and days which elapsed during the relevant period of pensionable service.
24. That interpretation would accord with the corresponding provisions of the NHS (Superannuation) Regulations 1980 (SI 1980/362) (the "**1980 Regulations**"), which were superseded by the 1995 Regulations. In Regulation 35 of the 1980 Regulations, (calculation of service in part-time employment) of the 1980 Regulations, paragraph (1) states that, for the purposes of considering whether a member's pensionable service has exceeded any of the limits set out in the 1980 Regulations, or whether a member who is an MHO has completed the necessary pensionable service to qualify for double-counting of their pensionable service, "*the service of an officer in part-time employment shall be treated as whole-time service*".
25. It seems to me that the term "calendar length", used by NHS BSA in its explanations of Mrs E's benefit calculation, has been used in place of the term "full length", which is used in Regulation R5. Although confusing, the use of the term "calendar length" in

place of “full length” does not invalidate NHS BSA’s method of considering whether the limit on pensionable service under Regulation C2(3)(b) applied.

26. In Mrs E’s case, her pensionable service included the additional pensionable service, which Mrs E was entitled to under Regulation R3(5)(b) as a consequence of having completed 20 years’ pensionable service as an MHO.
27. In accordance with Regulation R5(10), for the purpose of ascertaining whether Mrs E’s pensionable service exceeded the limit imposed by Regulation C2(3)(b), the “full length” of her pensionable service was compared with that limit.
28. As the full length of Mrs E’s pensionable service (bearing in mind her entitlement to doubling under Regulation R3(5)(b) exceeded the 40 year limit under Regulation C2(3)(b), NHS BSA rightly counted only 40 full length years of Mrs E’s pensionable service.
29. As is demonstrated in NHS BSA’s letter of 1 March 2018, the actual hours that Mrs E had worked in each “pension year” (i.e. the period from 1 April to 31 March the following year) were used as the basis for deciding which pension years to disregard in order to reduce Mrs E’s pensionable service before her 55th birthday to the 40 year maximum, with the years in which the least hours had been completed being excluded. This meant that only the pension years that would have been the least beneficial to Mrs E in terms of the length of her pensionable service were excluded.
30. In accordance with the requirements of Regulation R5(1), the remaining pension years were then scaled back to their “whole-time equivalent” pensionable service, for the purpose of calculating Mrs E’s pension benefits under the scheme.
31. NHS BSA’s use of the term “reckonable membership” to describe Mrs E’s whole-time equivalent pensionable service appears to be reminiscent of the 1980 Regulations’ use of the phrase “reckoning of contributing service”, in the same context that “pensionable service” is used in the 1995 Regulations. Again, whilst I agree that this is confusing, I do not consider that it invalidates NHS BSA’s calculation of Mrs E’s whole-time equivalent pensionable service.
32. Therefore, I do not uphold Mrs E’s complaint.

Karen Johnston

Deputy Pensions Ombudsman
5 June 2018